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In the Wake of Tragedy: The Citizens Cry Out for War, but Can the United States Legally Declare War on Terrorism?

Stacie D. Gorman*

Abstract

Terrorists hide throughout the world, but on September 11, 2001, some of those terrorists climbed out of their hiding places and attacked the United States. President George W. Bush promised the population of the United States a war on terrorism, but this promise is contrary to international law because it violates both the customary practices of nations and provisions of the United Nations Charter regarding war.

I. President George W. Bush Speaks Compelling Words Preparing a Nation for War, but What Do These Words Presume?

“Our nation — this generation — will lift a dark threat of violence from our people and our future. We will rally the world to this cause by our efforts, by our courage. We will not tire, we will not falter, and we will not fail.”¹ President George W. Bush spoke these powerful words in order to prepare Americans to go to war against terrorists for the acts that they perpetrated against the United States.²

His expression presupposes that the United States’ ability to declare war is not limited to declarations against other nations.³ His speech assumes that the United States can declare war against terrorists and their

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1. Lynn Smith et al., *After the Attack the Presidential Address Bush Drew on Strengths in His Address to the Nation Speech: The President Is Mostly Praised for Powerful Oratory That Used Simple Words To Frame a Complex Conflict for Many Audiences*, L.A. TIMES, Sept. 22, 2001, at A4, available at 2001 WL 2519802.

2. *Id.*

3. *Id.*

leaders.⁴ Additionally, these words convey an underlying idea that one person, or a group of people, not comprising a nation, can commit an act of war against the United States.⁵

There are several questions that arise from President Bush's speech. Can terrorists truly commit an act of war against the United States or are their actions against America properly deemed crimes — appalling and of a large magnitude, but crimes nevertheless? Is a declaration of war against a group, which does not possess sovereignty in its own right, opposed to customary practice and international law? Can the United States declare war against terrorists or should it hale them into court to face prosecution for violating the laws of this country?

First, this comment will describe the massacre and other atrocities committed by Osama bin Laden and his terrorist organization, Al Qaeda, against the United States.⁶ It will then examine whether cases that have been decided in the United States concerning terrorists and war affect the capability of the United States to declare war against terrorists. Afterward, this comment will delve into the practice of war throughout history in order to determine if the United States would violate customary international law by declaring war on terrorists.

Next, this comment will examine whether the United States Constitution or statutes enacted by Congress constrain the United States' aspiration to declare war on terrorists. This comment will then explore whether the law of nations imposes any restrictions upon the United States' ability to declare war on terrorists. This comment will also analyze what effect the United Nations Charter could have on the United States' capacity to declare war on terrorists. Finally, this comment will examine whether other events might indicate that the United States recognized potential limitations on its ability to declare war against terrorism.

II. Terrorism Strikes on the Soil of the United States

Terrorist groups use murder or threats as a means to inspire fear, and, through this, gain power.⁷ "Increased access to modern transportation has made it much easier for terrorists to go from one country to another and even across continents in just a few hours. Air

4. *Id.*

5. *Id.*

6. *Bin Laden Admits Guilt, Says Bush*, Western Mail, Dec. 15, 2001, at 4 (discussing a videotape in which Osama bin Laden "boasted about his advance knowledge of the suicide hijackings and spoke about how the destruction of the World Trade Centre [sic] towers had exceeded even his optimistic calculations.").

7. GENNARO F. VITO & RONALD M. HOLMES, *CRIMINOLOGY: THEORY, RESEARCH, AND POLICY* 288 (1994).

transportation not only increases mobility, it also serves as another opportunity for terrorism. Skyjacking and hostage taking are common occurrences.”⁸ One group of terrorists recently came up with a new and tragic way to exploit the air transportation system in order to instill fear in the citizens of the United States.⁹

On September 11, 2001, terrorists hijacked four airplanes in the United States.¹⁰ All of the planes started out from the east coast and were bound for California; consequently, they were full of fuel.¹¹ The hijackers flew two of these planes into the World Trade Center in New York City.¹² Thousands of innocent people lost their lives and many others were injured during the crash and the resulting destruction of the Twin Towers.¹³ Furthermore, the devastation resulted in worldwide financial pandemonium as it necessitated the temporary closing of the New York Stock Exchange.¹⁴ This mayhem was further aggravated by the fact that all airplanes were grounded for several days¹⁵ impeding transportation and hurting the airline industry and other travel related businesses financially.¹⁶

One of the other planes was flown into the Pentagon, the center of military activity, located on the outskirts of Washington, D.C.¹⁷ This act destroyed a section of the building, killing and injuring hundreds of military personnel, government workers, and civilians.¹⁸ The passengers wrenched control of the fourth jet from the terrorists, and the airplane crashed into the woods of a town just outside Pittsburgh, Pennsylvania.¹⁹

Those responsible for this horrible bloodshed are members of the

8. *Id.* at 289.

9. Michael Grunwald, *Terrorists Hijack Four Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead; Bush Promises Retribution; Military Put on Highest Alert*, WASH. POST, Sept. 12, 2001, at A01, available at 2001 WL 27731754.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Michael Schroeder et al., *Attack Shuts Down U.S. Markets and Causes Global Declines—Markets Will Remain Closed Again Today; Officials Assess Damage*, WALL ST. J., Sept. 12, 2001, at B1, available at 2001 WL-WSJ 2875330. “In the wake of the destruction caused by the terrorist attack on lower Manhattan, the nerve center of U.S. finance, all major markets were closed yesterday and will remain closed today, as officials scramble to instill confidence in shaken global investors.” *Id.*; see also E.S. Browning, *Wall Street, Resolute, Will Trade Again —Traders, Firms and Investors Await Opening*, WALL ST. J., Sept. 17, 2001, at C1, available at 2001 WL-WSJ 2875601. “At about 9:33 this morning, the opening bell will ring again at the New York Stock Exchange—and the world will be watching.” *Id.*

15. Grunwald, *supra* note 9.

16. Browning, *supra* note 14.

17. Grunwald, *supra* note 9.

18. *Id.*

19. *Id.*

terrorist organization, Al Qaeda.²⁰ The notorious leader of this organization is Osama bin Laden.²¹ Al Qaeda is unwavering in its desire to destroy Americans, Christians, and Jews, and it does not discriminate on the basis of age or sex of the people it desires to destroy.²² Members of this organization, as well as members of other terrorist organizations, receive training on how to inflict terror upon populations.²³ The various members are then sent to live in nations throughout the world.²⁴ These trained terrorists wait until the time arrives for them to implement their respective organizations' plans of annihilation.²⁵

Actions executed by Al Qaeda have been regarded by the media as acts of war.²⁶ President Bush has referred to the conduct as the beginning of the first war of the twenty-first century.²⁷ The President analogized the atrocities to the bombing of Pearl Harbor in 1941, stating that this was the only other time where war had taken place on domestic soil.²⁸

There are some people who are not as willing to acknowledge the hijacking as the commencement of hostilities.²⁹ Theodore Sorenson, a speechwriter for President Kennedy, opined that war was an act between two governments, and that terrorist events, such as those of September 11, constitute horrendous crimes.³⁰ Retired General Anthony C. Zinni asserted that the military should not be involved and that terrorists should be treated as lawbreakers, not soldiers of war.³¹ According to General Zinni, "[t]reating terrorists as warriors only enhances their status".³²

Others also believe that Osama bin Laden has committed a crime

20. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), in *Transcript of President Bush's Address*, WASH. POST, Sept. 21, 2001, at A24, available at 2001 WL 28358541 [hereinafter President Bush's Address]. "The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda." *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Steven Mufson, U.S. Urged To Target Nations That Aid Terrorism; N.Y., Pentagon Attacks Are Called Acts of War, WASH. POST, Sept. 12, 2001, at A12, available at 2001 WL 27731864.

27. Smith et al., *supra* note 1.

28. President Bush's Address, *supra* note 20. "On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars, but for the past 136 years they have been wars on foreign soil, except for one Sunday in 1941." *Id.*

29. Smith et al., *supra* note 1.

30. *Id.*

31. Tom Bowman, *Waging the War Against Terror Broad Strategies Called for in Rugged Afghanistan Terrain; 'Have To Remove Old Rules'; Terrorism Strikes America; the Military Response*, BALT. SUN, Sept. 20, 2001, at 1A, available at 2001 WL 6170186.

32. *Id.*

and should stand trial in the United States just as any other criminal would.³³ David Scheffer, United States Ambassador at Large for War Crimes, stated that bin Laden should be captured and brought to justice in a court of law, and, further, that the Security Council has endorsed that position in resolutions since 1998.³⁴ Harry Browne, former Libertarian presidential candidate, said: "Everyone deserves their day in court, including Osama bin Laden."³⁵

Demolishing buildings did not satisfy the desires of the terrorists in their quest to devastate the United States. In addition to the tragedies of September 11, it is now alleged that terrorists, perhaps from within the United States, have been attacking people through the postal system.³⁶

On October 2, 2001, an employee of a Florida tabloid slipped into a coma.³⁷ It was later determined that the coma was caused by anthrax, which he had been infected with after opening a letter containing spores of the deadly substance.³⁸ The attacks did not stop with this one letter.³⁹ Three more letters were also sent out: one was sent to the New York Post, another to Tom Brokaw at NBC, and the third to Senate Majority Leader Tom Daschle.⁴⁰ Although each of these letters contained different language, they all had one phrase in common: "Death to America. Death to Israel. Allah is Great."⁴¹ The expression contained in these letters is similar to words that have been spoken by Osama bin Laden in which he indicated that the reign of terror would last as long as the United States continued to support Israel.⁴² He has also threatened that further atrocities will befall the United States and its supporters.⁴³

Osama bin Laden's threats of further terrorist activity⁴⁴ appear to

33. *Burden of Proof* (CNN broadcast, Oct. 6, 2001).

34. *Id.*

35. *Hannity and Colmes* (Fox News broadcast, Nov. 22, 2001).

36. Guy Gugliotta, *Sorting the Mail, Searching for 'a Shadow Enemy'; Investigators Try To Piece Together a Deadly Puzzle*, WASH. POST, Oct. 28, 2001, at A16, available at 2001 WL 29165365. "It is the first time in history that the U.S. mail has been used to wage biological war." *Id.*

37. Peter Slevin & Justin Blum, *At Fla. Tabloid Company, a Search for Motive; First Anthrax Case, Which Ended in Photo Editor's Death, Has Investigators, Employees Asking Why*, WASH. POST, Oct. 17, 2001, at A22, available at 2001 WL 27411563.

38. *Id.*

39. Gugliotta, *supra* note 36.

40. *Id.*

41. *Id.*

42. Michael Beach, *Three More Victims As Outbreak Spreads - Attacks To Continue: Terrorists - War on Terror: New Threats*, DAILY TELEGRAPH (Sydney), Oct. 15, 2001, at tbl. 4.

43. *Id.* "He also urged Muslims not to travel by plane and to avoid high-rise buildings in countries that are taking part in air and missile strikes against Afghanistan." *Id.*

44. *Id.*

have taken form as an alleged Al-Qaeda member, Richard Reid, committed the most recent act of terrorism.⁴⁵ On December 22, 2001, Reid boarded a plane in Paris, France, that was bound for the United States.⁴⁶ Inside of his shoes, he had placed an explosive with which he intended to obliterate the plane, a skill that authorities believe he was taught in an Al Qaeda training camp.⁴⁷ His attempt to destroy the plane and murder the 194 crewmembers on board was stymied when a stewardess smelled the match that he had intended to use in order to light the wire and ignite the explosive.⁴⁸ Passengers and members of the flight crew restrained him, and two doctors injected Reid with a sedative.⁴⁹ The plane made an emergency landing at Logan International Airport in Boston, Massachusetts, where police security forces surrounded it.⁵⁰ Reid was taken into custody and placed in a jail cell where he was held without bail to await trial.⁵¹ He will now serve out the rest of his life in a jail cell for his crimes;⁵² however, he did not face the death penalty because no one was killed during the incident.⁵³

III. What Is War: Defining War in the United States and in International Law

A. *Cases from the Courts of the United States Defining War and Terrorism: Can the United States Declare War Against Terrorists?*

In 1974, the United States Court of Appeals for the Second Circuit decided a case involving an airplane that was hijacked by terrorists and

45. Eric Lichtblau & Josh Meyer, Response to Terror - U.S. Officials Indict Shoe-Bomb Suspect Courts: Government Accuses Richard C. Reid of Being Trained as an Al Qaeda Terrorist. He Faces Life in Prison, L.A. TIMES, Jan. 17, 2002, at A8, available at 2002 WL 2447079.

46. *Jury Indicts Jet Passenger; Shoe Bombs Could Net Five Life Terms*, SAN ANTONIO EXPRESS-NEWS, Jan. 17, 2002, at A6, available at 2002 WL 7097600 [hereinafter *Jury Indicts Jet Passenger*].

47. Dan Eggen, Suspect in Bomb Attempt Indicted; Man Was Trained in Al Qaeda Camp, Authorities Allege, WASH. POST, Jan. 17, 2002, at A1, available at 2002 WL 2521705.

48. *Id.*

49. Richard Palmer, *Photos That Show the Fear as Passengers Saved Their Jet*, EXPRESS, Dec. 31, 2001, available at 2001 WL 31301406.

50. *Id.*; see also Pamela Ferdinand, *No Bail for Suspect in Attempted Bombing; FBI Says Explosives in Man's Shoes Could Have Pierced Airplane's Fuselage*, WASH. POST, Dec. 30, 2001, at A18, available at 2001 WL 32201974 [hereinafter Ferdinand, *No Bail*].

51. Ferdinand, *No Bail*, *supra* note 50.

52. Pamela Ferdinand, *Would-Be Shoe Bomber Gets Life Term; Al Qaeda Member Shouts at Judge*, WASH. POST, Jan. 31, 2003, at A01, available at 2003 WL 10894399 [hereinafter Ferdinand, *Would-Be Shoe Bomber*].

53. Eggen, *supra* note 47; see also *Jury Indicts Jet Passenger*, *supra* note 46; *infra* text accompanying note 141 (discussing potential punishment of Richard Reid).

subsequently destroyed.⁵⁴ The court stated: "The cases establish that war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty. Under international law, war is waged by states or state-like entities."⁵⁵ The court determined that the airplane was lost due to the acts of criminals and not to the actions of nations at war.⁵⁶ The United States District Court for the Southern District of New York decided a case in 1983 involving a hotel that was damaged when fighting broke out in Lebanon.⁵⁷ The court considered the actions and stated: "The international law definition of war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character."⁵⁸

Under these definitions of war, the United States would not be able to declare war against terrorists. According to these courts, terrorists are not sovereign states;⁵⁹ therefore, terrorism is not an act of war but a crime.⁶⁰ "National sovereignty is the undivided power of a people and their government within a territory, inherent in which are the overarching rights of the nation to defend itself from outside threats, to act in relation to other nations, and to secure its territory and assets."⁶¹ "Terrorists unlike [the] governments that protect them, have no armies, navies or well-fortified headquarters."⁶² If war can only be waged between sovereigns, and terrorist organizations do not possess the qualifications of sovereignty, then the United States will have to resort to the court system in order to prosecute the offenders for criminal violations.

However, in a more recent decision, the definition of terrorist actions was altered. In 1993, terrorists bombed the World Trade Center

54. *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974).

55. *Id.* at 1012. "The Court was called upon to decide whether the hijacking of a plane by terrorists constituted an act of war or a crime in order to determine whether an insurance policy was applicable." *Id.* at 989. *Black's Law Dictionary* defines a sovereign state as follows:

[A sovereign state is] one that possesses an independent existence, being complete in itself, without being merely part of a larger whole to whose government it is subject; a political community whose members are bound together by the tie of common subjection to some central authority, whose commands those members must obey.

BLACK'S LAW DICTIONARY 1401 (7th ed. 1999).

56. *Pan Am. World Airways*, 505 F.2d 1013.

57. *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1461 (S.D.N.Y. 1983).

58. *Id.* at 1465 (quoting *Pan Am. World Airways*, 505 F.2d at 1012).

59. BLACK'S LAW DICTIONARY 1401 (7th ed. 1999); see *supra* note 55 (quoting definition of a sovereign state).

60. *Pan Am. World Airways*, 505 F.2d 1013; see also *Holiday Inns*, 571 F. Supp. 1465.

61. 45 AM. JUR. 2D *International Law* § 41 (1999).

62. Bowman, *supra* note 31.

and attempted to bomb other areas in New York City.⁶³ In a 1999 case, the United States Court of Appeals for the Second Circuit upheld the charge against the terrorists of conspiracy to levy war against the United States.⁶⁴ In so holding, the court relied on the fact that the terrorists who perpetrated the act possessed formal military training.⁶⁵ The terrorists in this case were likened to soldiers attempting to engage in combat against the United States.⁶⁶

Similarly, terrorists that possessed formal military training carried out the attacks on September 11, 2001.⁶⁷ They were specifically trained to fly airplanes of the size used in the attacks.⁶⁸ Osama bin Laden and his militant network are said to be responsible not only for this occurrence, but also are suspected to have taken part in the 1993 bombing of the World Trade Center.⁶⁹ The terrorists involved in the 1993 bombing were convicted of conspiracy to levy war against the United States.⁷⁰ It would seem to follow that, because the same group is suspected here in an analogous situation, the court would be inclined to follow precedent and find the terrorists involved in this action guilty of conspiracy to levy war against the United States.⁷¹ Accordingly, if the terrorists were levying war against the United States, this country would be justified in engaging in self-defense.

However, the fact that the terrorists were tried in the court system — not fought on the battlefield — indicates that terrorists are criminals, and not soldiers of war. Although the charge against them was conspiracy to levy war against the United States, this was a criminal charge, punishable with jail time, not an act of warfare to be retaliated against with missiles.⁷² The practice of trying terrorists in a court of law suggests that the United States has, in the past, recognized that it is limited in its ability to declare war against terrorist groups.

In circumstances in which the United States is in hot pursuit, it may be appropriate for it to utilize the military in order to extract these felons

63. *United States v. Rahman*, 189 F.3d 88, 104 (2d Cir. 1999).

64. *Id.* at 123. “First, we find ample evidence in the record to support the jury’s finding that there was indeed a conspiracy to “levy war” against the United States. Over the course of the trial, the jury was presented with considerable evidence of a conspiracy.” *Id.*

65. *Id.* “The evidence included the fact that many of the defendants in this case, as well as many the World Trade Center defendants, participated in military training exercises the purpose of which was to train members to carry out jihad ‘operations.’” *Id.*

66. *Id.*

67. Grunwald, *supra* note 9.

68. Mufson, *supra* note 26.

69. Grunwald, *supra* note 9.

70. *Rahman*, 189 F.3d at 123.

71. *Id.*

72. *Id.*

from the countries in which they are hiding and bring them to justice in the court system.⁷³ However, to engage terrorists on a field of battle is not proper, especially when there have not been recent atrocities executed by such terrorists against the United States.⁷⁴

B. International Custom: War Customarily Has Been Between Two or More Nations

Rules of international law can be in the form of customary law.⁷⁵ “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”⁷⁶ Throughout the course of history, war has customarily been between two or more nations.⁷⁷

Illustrations of one nation engaging one or more other nations in war can be seen throughout the course of history.⁷⁸ The most prominent examples of such warfare are World War I and World War II,⁷⁹ in which multiple nations were occupied in a war against Germany and its allies.⁸⁰ There are many other examples that demonstrate the fact that the customary practice of nations is to engage in war only against other nations, and that nations adhere to that tradition.⁸¹ It has not been the practice of civilized nations to engage in battle with a small group of people lacking sovereignty.⁸²

This adherence to custom can be seen in the United States’ military history. For example, the War of 1812 was fought between the United States and England.⁸³ The Spanish-American war was fought between

73. 10 U.S.C. § 374(b)(1) (2001). The statute provides, in pertinent part, as follows: Subject to paragraph (2) and in accordance with other applicable law, the Secretary of Defense may, upon request from the head of a Federal law enforcement agency, make Department of Defense personnel available to operate equipment (including equipment made available under section 372 of this title) with respect to —

....

(D) a rendition of a suspected terrorist from a foreign country to the United States to stand trial.

Id.

74. U.N. CHARTER art. 51, para. 1.

75. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1)(a) (1987).

76. *Id.* § 102(2).

77. John Pike, *United States Military Operations*, at <http://www.fas.org/man/dod-101/ops/> (last visited Apr. 5, 2003); see also *supra* note 54 and accompanying text (discussing the international law definition of war).

78. Pike, *supra* note 77.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. JETHRO K. LIEBERMAN, *THE EVOLVING CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING* 567-68 (1992); see also Pike,

the United States and Spain.⁸⁴ Although these are just two examples, there are several other wars throughout the United States history, and each of them has involved the United States engaging one or more nations, not one or more persons.⁸⁵

Terrorist organizations do not fit within the definition of a nation as set forth by the Montevideo Convention, which defines a nation as having defined boundaries, a permanent population presided over by a government, and the capacity to enter into agreements with other nations.⁸⁶ Terrorists live in various nations throughout the world and do not possess a territory with boundaries or a government in their own right.⁸⁷ In order to engage in a battle against terrorists, the United States would have to declare war on the respective nations in which the terrorists reside.⁸⁸

Although declaring war against the nations where terrorists hide would comply with the custom of entering into war against another nations, this would violate international law.⁸⁹ Presumably, the countries where the terrorists reside have not made threats against the United States, and therefore the United States would not be acting in self-defense as proscribed in the United Nations Charter.⁹⁰

Parties of the United Nations Charter are to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."⁹¹ A military invasion into the territory of other nations in the hope of uncovering terrorists that might be hiding therein is not in line with this provision of the United Nations Charter and therefore is in opposition to the law of nations.⁹²

IV. Can the United States Declare War on One Person or Group That Is Not a Nation?

supra note 77.

84. LIEBERMAN, *supra* note 83; *see also* Pike, *supra* note 77.

85. LIEBERMAN, *supra* note 83; *see also* Pike, *supra* note 77.

86. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19.

87. *Id.*; *see also* President Bush's Address, *supra* note 20.

88. Montevideo Convention on the Rights and Duties of States, *supra* note 86.

89. U.N. CHARTER art. 51, para. 1.

90. *Id.*

91. *Id.* art. 2, para. 4.

92. *Id.*

A. *Are There Any Constitutional or Statutory Restrictions That Would Limit the United States' Ability To Declare War Against Terrorism?*

Congress has the power to declare war, granted to it by the United States Constitution.⁹³ This expression of congressional power does not impose limitations against whom the United States can declare war. Based on this power alone, it would appear that the United States has the ability to declare war against terrorists, regardless of their lack of sovereignty.⁹⁴

In actuality this is not the case. One limitation to this power may be the ability of Congress to punish offenses against the law of nations, conferred upon it in the United States Constitution.⁹⁵ If a declaration against terrorists would violate customary international law, it would violate the law of nations. The customary practice of nations in going to war is to do so against other nations, not people within the nation.⁹⁶ Because the United States purports to punish offenses against the law of nations, it would be violating the Constitution to engage terrorists in a battle that would be contrary to customary international law, not to mention hypocritical.⁹⁷

Another limitation is that the United States government has already implemented a process by which terrorists are to be treated in the criminal justice system.⁹⁸ The statute specifically provides the definition of a terrorist action,⁹⁹ the basis of the United States' jurisdiction over the

93. U.S. CONST. art. I, § 8, cl. 11. "Congress shall have the power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." *Id.*

94. BLACK'S LAW DICTIONARY 1401 (7th ed. 1999); *see supra* note 55 (quoting definition of a sovereign state).

95. U.S. CONST. art I, § 8, cl. 10. "Congress shall have power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." *Id.*

96. *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1461 (S.D.N.Y. 1983).

97. U.S. CONST. art I, § 8, cl. 10, *see supra* note 95.

98. 18 U.S.C. § 2332b (2001).

99. *Id.* The statute provides, in pertinent part, as follows:

(a) Prohibited acts.

(1) Offenses. Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)—

(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or

(B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;

in violation of the laws of any State, or the United States, shall be punished as prescribed in subsection (c).

actions,¹⁰⁰ and the penalties for committing such acts.¹⁰¹ The statute does

(2) Treatment of threats, attempts and conspiracies. Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished under subsection (c).

Id.

100. *Id.* The statute provides, in pertinent part, as follows:

(b) Jurisdictional bases.

(1) Circumstances. The circumstances referred to in subsection (a) are—

(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;

(B) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;

(C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States;

(D) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, or leased to the United States, or any department or agency of the United States;

(E) the offense is committed in the territorial sea (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) of the United States; or

(F) the offense is committed within the special maritime and territorial jurisdiction of the United States.

(2) Co-conspirators and accessories after the fact. Jurisdiction shall exist over all principals and co-conspirators of an offense under this section, and accessories after the fact to any offense under this section, if at least one of the circumstances described in subparagraphs (A) through (F) of paragraph (1) is applicable to at least one offender.

Id.

101. *Id.* The statute provides, in pertinent part, as follows:

(c) Penalties.

(1) Penalties. Whoever violates this section shall be punished—

(A) for a killing, or if death results to any person from any other conduct prohibited by this section, by death, or by imprisonment for any term of years or for life;

(B) for kidnapping, by imprisonment for any term of years or for life;

(C) for maiming, by imprisonment for not more than 35 years;

(D) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than 30 years;

(E) for destroying or damaging any structure, conveyance, or other real or personal property, by imprisonment for not more than 25 years;

(F) for attempting or conspiring to commit an offense, for any term of years up to the maximum punishment that would have applied had the offense been completed; and

(G) for threatening to commit an offense under this section, by imprisonment for not more than 10 years.

(2) Consecutive sentence. Notwithstanding any other provision of law, the court shall not place on probation any person convicted of a violation of this section; nor shall the term of imprisonment imposed under this section run concurrently with any other term of imprisonment.

Id.

not provide authority for the United States to penalize terrorists with bombs or other acts of war.¹⁰²

Osama bin Laden and Al Qaeda committed actions¹⁰³ that are specifically covered by this statute, so the courts of the United States can exert jurisdiction over their actions.¹⁰⁴ The terrorists are alleged to have used the mail to infect certain individuals in the government and the media with anthrax,¹⁰⁵ which gives the courts jurisdiction under the statute.¹⁰⁶ Additionally, hijacking the airplanes interrupted foreign and interstate commerce by causing the New York Stock Exchange to be shut down and by grounding air transportation,¹⁰⁷ providing another basis for jurisdiction.¹⁰⁸ Two other bases for jurisdiction were established when one of the airplanes was flown into a section of the Pentagon building,¹⁰⁹ because this involved an attack upon a government building and involved the victimization of uniformed and government personnel.¹¹⁰ Since jurisdiction is established, the act provides for the courts to impose imprisonment or the death penalty for the commission of these actions by the terrorists.¹¹¹

Other statutes that Congress has enacted also contemplate terrorist actions as crimes. One statute permits the use of defense personnel to extract terrorists from foreign countries and bring them to the United States in order to stand trial.¹¹² Although this does contemplate using the military to capture terrorists, it does not rise to the level of justifying a declaration of war in order to accomplish the goal.

Congress has gone to great lengths to enact statutes that define what constitutes a terrorist act, provide the bases for jurisdiction of United States' courts, and define the penalties to be imposed if a terrorist is convicted, giving credence to the idea that terrorists are not soldiers, but criminals.¹¹³ If Congress had intended for terrorists to be treated as

102. *Id.*

103. President Bush's Address, *supra* note 20.

104. 18 U.S.C. § 2332b(b); *see supra* note 100 (quoting parts of statute concerning jurisdictional issues).

105. Gugliotta, *supra* note 36.

106. 18 U.S.C. § 2332b(b); *see supra* note 100 (quoting parts of statute concerning jurisdictional issues).

107. Schroeder et al., *supra* note 14; *see also* Browning, *supra* note 14.

108. 18 U.S.C. § 2332b(b); *see supra* note 100 (quoting parts of statute concerning jurisdictional issues).

109. Grunwald, *supra* note 9.

110. 18 U.S.C. § 2332b(b); *see supra* note 100 (quoting parts of statute concerning jurisdictional issues).

111. 18 U.S.C. § 2332b(c); *see supra* note 101 (quoting parts of statute dealing with penalties for convicted terrorists).

112. 10 U.S.C. § 374(b)(1)(D); *see supra* note 73. (discussing when it is appropriate to use the military in pursuit of terrorists).

113. 18 U.S.C. § 2332b.

soldiers, it would have created a statute that provided for a declaration of war instead of incarceration in a jail cell.¹¹⁴

B. Restriction by International Custom: Does the Law of Nations Preclude the United States from Declaring War Against One Person or Group if the United States' Constitution Does Not?

Only on five occasions has the United States officially declared war: the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II.¹¹⁵ These official wars were all fought against another nation or other nations. The War of 1812 was fought between the United States and England.¹¹⁶ The Mexican War was fought against Mexico.¹¹⁷ The Spanish-American War was fought between the United States and Spain.¹¹⁸ Both World War I and World War II were fought by multiple nations throughout the world.¹¹⁹

Additionally, the United States has gone to war in an unofficial capacity, but when it has done so, these wars have also been against other nations. Examples of such wars include the Korean War, fought between the United States and Korea, and the Vietnam War, fought between the United States and Vietnam.¹²⁰

Both in an official and unofficial capacity, the wars in which the United States has traditionally engaged have been between itself and at least one other nation.¹²¹ This indicates that the United States has perceived its ability to declare war under international law as limited to a war against other sovereign states.

C. Does the United Nations Charter Prohibit the United States from Declaring War?

As a member of the United Nations, the United States has agreed to settle its international disputes in a peaceful manner.¹²² This provision of the United Nations Charter would appear to prevent the United States from declaring war against one nation.

114. *Id.* § 2332b(c); *see supra* note 101 (quoting parts of statute dealing with penalties for convicted terrorists).

115. LIEBERMAN, *supra* note 83.

116. Pike, *supra* note 77.

117. *Id.*

118. *Id.*

119. *Id.*

120. LIEBERMAN, *supra* note 83.

121. *Id.*; *see also* Pike, *supra* note 77.

122. U.N. CHARTER art. 2, para. 3. "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." *Id.*

However, the Charter continues, stating that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”¹²³ According to this provision, the United States does have the power under the charter to protect itself if attacked. In order for this provision to be seen as potentially authorizing the United States to declare war against terrorists, it must be determined what the nature of the attacks were against the United States. It could be argued that the use of airplanes does not correspond to an armed attack, but instead a crime. If this is the case, then the United States would be obligated not to go to war, but, instead, to prosecute the terrorists in a manner consistent with the practice of international law.

On the other hand, if the attack using airplanes does denote an act of war, in that the effect of the airplanes could be analogized to an explosion caused by a bomb,¹²⁴ then the United States would be able to declare war in self-defense.¹²⁵ This would then be consistent with the law of nations.¹²⁶

This would, however, raise another potential problem for the United States. Terrorists do not possess a sovereign state, but live in a variety of nations throughout the world.¹²⁷ Therefore, the United States would inevitably have to invade the territories of countries that have not attacked the United States in order to wage a campaign against terrorism.¹²⁸ The United States cannot commence hostilities against countries that have not previously committed acts of aggression against it, as this would violate the provisions of the United Nations Charter that allow for countries to act only in self-defense.¹²⁹

Additionally, the Charter prevents nations from making threats or using force “against the territorial integrity or political independence of any state.”¹³⁰ To invade another nation in the hunt for terrorists would violate this provision of the Charter.¹³¹ A violation of the United Nations Charter would be a violation of international law; therefore, the United States cannot pursue terrorists throughout the world.

However, the unofficial war in which the United States engaged

123. U.N. CHARTER art. 51, para. 1.

124. Joel Achenbach, ‘*You Never Imagine’ a Hijacker Next Door*, WASH. POST, Sept. 16, 2001, at A01, available at 2001 WL 27732809.

125. U.N. CHARTER art. 51, para. 1.

126. *Id.*; see also U.S. CONST. art I, § 8, cl. 10; *supra* note 94 and accompanying text.

127. President Bush’s Address, *supra* note 20.

128. *Id.*

129. U.N. CHARTER art. 51, para. 1.

130. *Id.* art. 2, para. 4.

131. *Id.*

against Afghanistan can potentially be justified under the United Nations Charter. The government of Afghanistan could be seen as a co-conspirator in the actions taken by Osama bin Laden and Al Qaeda. Not only did it afford protection to the organization, but it also afforded the terrorists the ability to train openly for their attack against the United States, possibly making Afghanistan a collaborator. Therefore, the United States' war against Afghanistan could be seen as an act of self-defense, and proper under the provisions of the United Nations Charter.¹³² However, further wars against terrorism involving the invasion of other countries could not be justified under international law without at least showing that those countries facilitated terrorist activities against the United States.¹³³

V. Do Other Events Indicate That the United States Might Recognize That It Is Limited in Its Ability To Declare War Against Terrorism?

Richard Reid was apprehended when he attempted to destroy an American Airlines flight bound for the United States and kill the passengers on board the plane with a bomb that he had created and placed inside his shoes.¹³⁴ This action is similar to the previous transgressions carried out by Al Qaeda on September 11, except in that case the planes were the bombs, and they succeeded in their deadly plots.¹³⁵

When Richard Reid was removed from the plane, a missile was not dropped on him,¹³⁶ as it was upon the terrorists in Afghanistan.¹³⁷ Military personnel did not shoot at him as he exited the plane either.¹³⁸ Instead he was arrested by police security and placed in a jail cell, alive, and held without bail to await indictment in the United States court system.¹³⁹

Instead of declaring war against Reid, but the United States haled him into a court of law and charged him with committing a crime.¹⁴⁰ On January 16, 2002, he was indicted and charged with committing several offenses, including "attempted use of a weapon of mass destruction, attempted murder, . . . attempted destruction of an aircraft, . . . and

132. *Id.* art. 51, para. 1.

133. *Id.* art. 2, para. 4.

134. Eggen, *supra* note 47.

135. Achenbach, *supra* note 124.

136. Ferdinand, *No Bail*, *supra* note 50. "U.S. Magistrate Judge Judith G. Dein Friday ruled there was probable cause for the arrest and ordered Reid held without bail." *Id.*

137. David S. Broder, *Nervous but Resolute, Americans Stand by Bush*, WASH. POST, Oct. 8, 2001, at A07, available at 2001 WL 28363050.

138. Ferdinand, *No Bail*, *supra* note 50.

139. *Id.*

140. *Id.*

attempted wrecking of a mass transportation vehicle, a new charge created by Congress in an anti-terrorism bill enacted after the Sept[ember] 11 attacks.”¹⁴¹

On October 5, 2002, Reid was convicted in federal court.¹⁴² He did not face the military for committing an act of war, but instead faced a jail cell to serve out a punishment of a life sentence for committing offenses contrary to the laws of the United States.¹⁴³ This method of dealing with terrorists is consistent with the past practice of the United States.¹⁴⁴

VI. Conclusion

There are several explanations for why the United States cannot engage terrorists on a battlefield. One reason that the United States cannot declare war against terrorists, generally, is based upon the Constitution. Although the Constitution, in the War Powers Clause, does not directly prohibit the United States from making a declaration of war against all terrorists, it does appear that such a declaration of war would violate the law of nations, which the United States specifically purports to defend and uphold in its Constitution.¹⁴⁵ This being the case, it would not be proper for the United States to engage in such a course of action as it would go against the provisions of the Constitution.¹⁴⁶

Another prominent reason for not enacting a blanket declaration of

141. *Jury Indicts Jet Passenger*, *supra* note 46. The charges against Richard Reid included:

One count of attempted use of a weapon of mass destruction. Two counts of interfering with a flight crew. Reid is accused of assaulting a flight attendant who tried to grab his sneaker and biting another attendant on the hand. One count of attempted wrecking of a mass transportation vehicle. One count of using a destructive device during a crime of violence. Each of the[se] counts carries a maximum sentence of life in prison. The attempted wrecking count is a new anti-terrorism offense created by the U.S.A. Patriot Act that gives the Justice Department greater wiretapping powers and expands the list of terror crimes.

One count of attempted homicide of U.S. nationals overseas. One count of placing an explosive device on an aircraft. One count of attempted murder of passengers on an aircraft. One count of attempted destruction of an aircraft. Each of th[e]se four counts carries a maximum penalty of 20 years in prison.

Id.

142. *'I Am an Enemy of Your Country'; 'Shoe Bomber' Pleads Guilty*, WASH. POST, Oct. 5, 2002, at A01, available at 2002 WL 101066034 [hereinafter *Enemy of Your Country*].

143. Ferdinand, Would-Be Shoe Bomber, *supra* note 52.

144. *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460 (S.D.N.Y. 1983); *see also* *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974).

145. U.S. CONST. art I, § 8, cl. 11, *see supra* note 93; *see also* U.S. CONST. art I, § 8, cl. 10; *see supra* note 95.

146. U.S. CONST. art I, § 8, cl. 10; *see supra* note 95.

war against terrorism is that terrorists reside in various nations throughout the world and do not possess sovereignty in their own right.¹⁴⁷ This would mean that, in order to declare war on terrorists, the United States would inevitably have to declare war upon the nation in which the terrorists reside, as it has done unofficially in Afghanistan.¹⁴⁸ When the United States commenced bombing Afghanistan on October 7, 2001, it did so under the orders of President Bush, without a formal declaration of war from Congress.¹⁴⁹

War against Afghanistan and terrorists located therein can potentially be justified under both customary international law and the United Nations Charter. The United States acted in self-defense when it invaded Afghanistan, which is permissible under the United Nations Charter.¹⁵⁰ The government of Afghanistan, the Taliban, acted with hostility in refusing to hand over Osama bin Laden.¹⁵¹ Further, it allowed terrorist training camps to be conducted openly within its territory.¹⁵² Therefore, the campaign that the United States waged against it was conceivably permissible under international law, as it was engaging in self-defense against a conspirator.¹⁵³ This would validate the United States having engaged in war with Afghanistan, even though Afghanistan did not participate directly in the carnage of September 11.¹⁵⁴

Once the United States has met its objectives in Afghanistan, future activity against terrorism will not be in self-defense, and would therefore not be acceptable under the United Nations Charter.¹⁵⁵ The United States cannot violate the territorial sovereignty of nations that do not currently pose a threat to it, looking for terrorists that have not attacked the United States.¹⁵⁶ Additionally, it would be contrary to international law, and a violation of the United Nations Charter, for the United States to go into a country and start dropping bombs, hoping to hit a terrorist, especially if it cannot be proven that the country provided assistance to the terrorist organization being sought.¹⁵⁷ Not only would the United States be violating the territorial integrity of another nation, but it would also not

147. President Bush's Address, *supra* note 20.

148. Broder, *supra* note 137.

149. President George W. Bush, Presidential Address to the Nation (Oct. 7, 2001), in *Bush's Address to the Nation*, WASH. POST, Oct. 8, 2001, at A06, available at 2001 WL 28363063.

150. U.N. CHARTER art. 51, para. 1.

151. See President Bush's Address, *supra* note 20.

152. *Id.*

153. U.N. CHARTER art. 51, para. 1; see also President Bush's Address, *supra* note 20.

154. President Bush's Address, *supra* note 20.

155. U.N. CHARTER art. 51, para. 1.; see also *President Bush's Address*, *supra* note 20.

156. U.N. CHARTER art. 51, para. 1.

157. *Id.*; see also *Id.* art. 2, para. 4.

be engaging in self-defense.¹⁵⁸

Another limitation on the United States ability to declare war is whether the terrorist actions rise to the level of war. The previous reasoning assumes that terrorist actions are actually a commencement of hostilities against the United States. However, previous terrorist actions against the United States have not been treated as the actions of soldiers at war.¹⁵⁹ Instead, such acts have been treated in the United States as being criminal in nature.¹⁶⁰

For example, Timothy McVeigh planted a bomb that demolished a federal government building in Oklahoma City on April 19, 1995, killing over a hundred people and injuring others.¹⁶¹ The Federal Government did not send the military to hunt him down, but instead he was arrested by police officers, held without bail,¹⁶² made to stand trial for his crimes, and received a death sentence for his crimes.¹⁶³ Before the attacks on September 11, this event was considered in the United States to be "America's worst mass murder and worst terrorist attack."¹⁶⁴ Because the United States' government did not use the military to bring justice to Timothy McVeigh, it should not now use it to bring justice to Osama bin Laden, Al Qaeda, or other terrorist organizations.

When Richard Reid was taken from an airplane at Logan International Airport for attempting to blow up a jet, a squadron of military soldiers did not greet him, but instead police security forces did.¹⁶⁵ He was placed inside a jail cell, held without bail,¹⁶⁶ and made to stand trial for his crimes,¹⁶⁷ just as Timothy McVeigh was.¹⁶⁸ Like McVeigh, Reid was charged with using a weapon of mass destruction.¹⁶⁹

158. U.N. CHARTER art. 51, para. 1; *see also* U.N. CHARTER art. 2, para. 4.

159. *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998).

160. *Id.*

161. Adam Pertman & Peter J. Howe, *Bomb Suspect Ordered Held For Grand Jury Inquiry*, B. GLOBE, Apr. 28, 1995, at 8, *available at* 1995 WL 5936015.

162. *Id.*

A federal magistrate last night ordered chief bombing suspect Timothy McVeigh detained for a grand jury investigation. . . . Calling evidence against the [twenty-seven]-year-old former Army sergeant "highly credible," US Magistrate Roland Howland ordered that McVeigh continue to be held without bail as prosecutors mount their case against him.

Id.

163. *McVeigh*, 153 F.3d at 1166. "Defendant was convicted in the United States District Court for the District of Colorado, Richard P. Matsch, Chief Judge, of conspiracy to use weapon of mass destruction, use of weapon of mass destruction, destruction by explosives, and first-degree murder, and was sentenced to death." *Id.*

164. Pertman & Howe, *supra* note 161.

165. Ferdinand, *No Bail*, *supra* note 50.

166. *Id.*

167. *Enemy of Your Country*, *supra* note 142.

168. *McVeigh*, 153 F.3d 1166.

169. *Jury Indicts Jet Passenger*, *supra* note 46; *see also supra* note 141.

The terrorists of September 11 also used weapons of mass destruction.¹⁷⁰ Why should their actions be treated differently from the way that McVeigh and Reid were treated by the United States? These terrorists have essentially committed the same offense, and they should all be treated equally as criminals and punished accordingly. One group should not be considered as having committed an act of war, while the other group is determined to have committed a crime.

Finally, Congress has already developed a statute that defines terrorism.¹⁷¹ This statute provides the courts of the United States with various bases for exerting jurisdiction over terrorists and the penalties that are to be imposed upon those persons that have been found guilty of having committing terrorist actions.¹⁷² It does not provide for the military to drop missiles upon the territories of other nations that have terrorists within them.¹⁷³ If that were the case, the United States military would have to invade almost every nation, including its own.¹⁷⁴ If Congress had intended to engage in warfare in order to punish terrorists, it would have enacted a statute to that effect. A statute to that effect though would most likely be struck down by the Supreme Court as contrary to the provisions of the United States Constitution and, therefore, not permissible.¹⁷⁵ Terrorists should be punished in a court of law as Congress intended, not on a battlefield.

170. Achenbach, *supra* note 124.

171. 18 U.S.C. § 2332b (2001).

172. *Id.*

173. *Id.*

174. President Bush's Address, *supra* note 20.

175. U.S. CONST. art I, § 8, cl. 11; *see supra* note 93; *see also* U.S. CONST. art I, § 8, cl. 10; *supra* note 95.